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STATUTES CITED

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1973

No. 73-362

ROGERS C. B. MORTON, *et al.*,

Petitioner,

v.

C. R. MANCARI, *et al.*,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Federation of Federal Employees is an independent labor organization representing exclusively employees of the Federal Government. The Federation currently represents approximately 120,000 Federal employees. Included in that number are approximately 5,000 Indian and non-Indian employees of the Bureau of Indian Affairs. The Federation seeks to represent before the Court the interest of those Federal employees employed by the Bureau of Indian Affairs as well as the interest of all Federal employees who will necessarily be affected by the outcome of this case.

The oversimplified issue of Indian Preference laws versus the Equal Employment Opportunity Law of

1972 skirts the true significance of the pending case, which touches upon the public interest in an effective civil service. The primary concern is the public interest; the interest of every Federal employee and indeed the interest every citizen has in maintaining an effective civil service system based squarely on the merit principle. The integrity of the civil service system is an important consideration over and above the limited interests of the parties.

The interrelationship between the civil service laws and the issues now pending, and the chain reaction effect any decision will have on merit system are matters that should be presented to the Court. Our interest therefore, is the broader public interest of an effective civil service and the preservation of the merit system. Our concern is to protect the interest of all Federal employees, both Indian and non-Indian in the Federal Civil Service system, and in particular to serve those employees who are members of the Federation.

We believe that the interests of the parties and the public interest in an effective civil service as well as the public interest in Indian self-determination and equal opportunity regardless of race are not necessarily irreconcilable. There is a middle ground; a way that will respond appropriately to seemingly contradictory public interests without doing grave violence to any particular national policy.

These competing interests, particularly the public interest and the interest of all Federal employees in a merit-based civil service free from racism or other taints are not adequately represented before the Court.

The National Federation of Federal Employees has represented the interests of Federal employees since 1917. As a major representative of Federal employees familiar with the civil service laws, we are uniquely

qualified to present to the Court those considerations of national interest which are not fully treated by the parties. We consider this case to be of paramount importance to all Federal employees and believe that it will have implications reaching far beyond the limited self-interest of the parties. Accordingly, the National Federation of Federal Employees prays the Court grant us leave to file the appended brief amicus curiae. Mancari has refused to consent to the Federation's filing of a brief amicus curiae.

Respectfully submitted,

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BRIEF AMICUS CURIAE

QUESTION PRESENTED

The pending case touches upon the public interest in a very real way. The National interest, and indeed the interest of every citizen, regardless of race, demands an effective civil service system based on the merit principle. Whether this overriding interest can or should yield to other important interests and national policies is the critical issue before the Court. The real issue facing the Court, therefore, may be phrased as follows:

> May the Indian Preference Laws, the Civil Service laws and the Equal Opportunity laws of

the United States be reconciled in such a fashion as to preserve our seemingly conflicting national policies of Indian self-determination of a civil service based on the merit system and of equal opportunity regardless of race.

INTRODUCTION

The American Indian has always enjoyed, and rightly so, a special legal status. This favored legal position was expressed, among other ways, in the so called "Indian Preference" laws. Of primary importance are Sections 45 and 472 of Title 25 of the United States Code. Section 45 provided that

> "In all cases of the appointment of interpreters or other persons employed for the benefit of Indians, a preference shall be given to persons of Indian descent, if such can be found, who are properly qualified for the execution of the duties."

and Section 472 provides that

> "The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions."

Prior to June, 1972 these laws, as well as the other "Indian Preference" laws were uniformly interpreted to mean that Indians would enjoy a preference for initial

appointments in the Federal Civil Service. This preference was considered fair and reasonable in that it provided opportunities that might not otherwise exist, for disadvantaged Indians to enter the Federal Service. Since all subsequent personnel actions, were strictly governed by the merit principle it was thought that the merit-based civil service system was not threatened by those non-competitive initial appointments.

In June, 1972 the Secretary of Interior determined that above reference Indian Preference laws mandated an absolute Indian Preference to all vacancies whether that vacancy was an initial appointment, a promotion or a transfer. This radical departure, coupled with a lack of provision for non-Indian employees of the Bureau of Indian Affairs, caused massive upheavals within the Bureau and plummeting morale amongst some Indian and especially non-Indian employees. Consideration was not given to the retroactive effect this change would have on the careers of non-Indian employees or the effect of this decision upon the merit principle and equal opportunity.

ARGUMENT

I.

THE PRESENT INTERPRETATION OF THE INDIAN PREFERENCE LAWS IS CONTRARY TO THE INTENT OF THOSE LAWS.

The key to the interpretation of the Indian Preference laws and the interest of the Congress lies in the word "appointment." Section 45 provides that "In all cases of *appointments* . . . a preference shall be given . . . (To Indians) and Section 472 similarly provides that ". . . . Indians . . . may be appointment with-

out regard to the Civil Service Law, to the various positions maintained . . . (and they) . . . shall . . . have the preference to appoint to vacancies in any such positions."

The word appointment has a specific meaning and it must be presumed that the Congress when it passed the Indian Preference laws was aware of that meaning. The meaning of the word may be derived from the Civil Service laws of the United States.

5 U.S.C. 3304(b) provides that "an individual may be appointed in the competitive service only if he has passed an examination or is specifically excepted. . ." 5 U.S.C. 3306(a) provides that "the President may prescribe rules which shall provide . . . that appointments in the departmental service . . . be apportioned. . ." and Section 3303 provides that "an individual concerned in examining an applicant for or appointing him in the competitive service may not receive . . . a recommendation (from a member of Congress)." Perhaps more to the point is 5 U.S.C. 3312 which deals with Veterans' Preference. It provides that "In determining qualifications of a Preference eligible for examination for, appointment in . . . the competitive service, the Civil Service Commission shall waive . . . (certain requirements)."

In the context of the above laws, it is clear that the word appointment refers only to entrance in, or initial appointment to the competitive service. That this is the correct interpretation is demonstrated by 5 U.S.C. 3317, which provides that

> "The Civil Service Commission shall certify enough names from the top of the appropriate register to permit a nominating or appointing authority who has requested a certificate of

eligibles to consider at least three names for appointment to each vacancy in the competitive service."

and Section 3316 provides that

"A preference eligible who has resigned or who has been dismissed or furloughed may be certified for, and appointed to, a position for which he is eligible in the competitive service."

Finally, 5 U.S.C. 2105(a)(1) defines an employee as an individual who is "appointed in the Civil Service. . . "

A fortiori, before any individual is eligible for either a transfer or a promotion in the competitive servce, he must first be a member of the competitive service. Thus, it is clear that when the various "civil service" laws refer to an "appointment" in the Competitive service, that reference must necessarily relate only to entrance into the competitive service. That the Congress intended to distinguish between appointments in the competitive service and promotions and transfer is shown by the treatment accorded these matters. Each topic is covered in separate chapter; nowhere that we have discovered does the Congress equate either a transfer or a promotion to an appointment.

By analogy to identical words in the Civil Service laws the words "position" and "vacancy" found in the various Indian Preference laws cannot have the same meaning as the word "appointment". The words "position" and "vacancy" are modified by the word "appointment" thus, the phrase that ". . . . Indians shall . . . have preference to appointment to vacancies in any . . . position." (5 U.S.C. 472) must mean, when read in the context of the Civil Service laws, that Indians shall have a preference for initial appointment to vacancies in any position in the competitive service.

Any other interpretation would have the effect of equating a promotion with an appointment.

The implementation of the Indian Preference Policy promulgated by the Secretary of Interior in June, 1972 is contrary to the Civil Service laws of the United States. The retroactivity of the new interpretation denies all current non-Indian employees promotional opportunities based on merit.

5 U.S.C. 3361 provides that "an individual may be promoted in the competitive service only if he has passed an examination. . ."

The clear effect of the retroactive application of the Indian Preference Policy is to destroy promotional opportunities for non-Indians since regardless of the results of any "examination" or other criteria all promotions are subjected to the preference.

II.

THE EQUAL OPPORTUNITY ACT OF 1972 PROHIBITS PREFERENCE BEYOND INTIAL APPOINTMENT.

Section 717(a) of the Equal Opportunity Act of 1972 provides that "all personnel actions affecting employees or applicants for employment . . . shall be made free from any discrimination based on race, or . . . National origin.

Section 717 does not provide for specific exceptions for Indian Preference. That the Congress considered the question of exceptions to the Act is, however, demonstrated by Section 712 which excepts ". . . special rights or preference for Veterans" from the Act.

The question of Indian Preference was also considered by the Congress. Section 703(i) provides

with respect to private employers that "(n)othing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publically announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation."

The Congress, therefore, considered the question of preference and chose not to exempt Indians from full coverage of the Act. Neither, however, did the Congress specifically rule out the possibility of some form of preference. The fact that the Congress did not specifically prohibit Indian Preference and allowed for a preference in private employment indicates that the Congress did not intend to prohibit all forms of preference for Indians. However, if implemented the Indian Preference Policy is contrary to the Equal Opportunity Act of 1972, because the retroactive application of the policy discriminates against and denies promotional opportunities to non-Indian employees solely on the basis of race.

III.

INDIAN PREFERENCE, THE CIVIL SERVICE LAWS AND THE EQUAL OPPORTUNITY ACT OF 1972 ARE RECONCILABLE.

Indians have traditionally enjoyed a special status. That status represents an obligation to our first citizens and ought not be disturbed providing that the overriding public interest in an effective Civil Service based on the merit principle and the national commitment to equal opportunity are not violated or seriously compromised. We submit that justice to

Indians and preservation of other national policies are reconcilable by the following actions.

1. Indian Preference, as it relates to promotions and transfers should not apply to current non-Indian employees.

2. All incoming non-Indian employees could reasonably be subjected to the policy through a contractual device.

3. Non-Indian employees who voluntarily agree to be subjected to the Indian Preference Policy should be guaranteed the right to transfer to a job in the Department of Interior that has promotional opportunities commensurate with the job being vacated in the Bureau of Indian Affairs.

CONCLUSION

Indians are entitled to a Preference in initial appointment. They may also be entitled to a preference in promotions and transfers providing promotional opportunities and transfers for current employees are not jeopardized. However, without adequate safeguards for current employees the Indian Preference Policy, as implemented, violates the Civil Service laws and the Equal Opportunity Act of 1972.

The illegality of the policy may, however, be cured. The illegality lies not in the policy, but in the retroactive application of the policy. As implemented it denies current Federal employees of their promotional and equal opportunity rights. We believe, however, that the alternatives proposed by us resolve the present

illegality of the Indian Preference Policy without undue interference with the legitimate aims of the policy.

Respectfully submitted,

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